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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 7/2018 concerning Vital Ndikumwenayo, Innocent Manirambona, Alphonse Akimana, Firmin Niyonkuru, Dismas Nduwayezu, Claude Nkeshimana, Télesphore Mbazumutima, Denis Bigirimana, Jean-Pierre Kantungeko, Dismas Birigimana, Thadée Kantungeko, Bernard Bigirimana, Berchmans Manirakiza, Sylvestre Nzambimana, Elias Hakizimana, Jean-Marie Nshimirimana, Astère Nahimana, Audace Nizigiyimana, Bernard Ndayisenga (Burundi)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), the Working Group transmitted to the Government of Burundi, on 21 December 2017, a communication concerning Vital Ndikumwenayo, Innocent Manirambona, Alphonse Akimana, Firmin Niyonkuru, Dismas Nduwayezu, Claude Nkeshimana, Télesphore Mbazumutima, Denis Bigirimana, Jean-Pierre Kantungeko, Dismas Birigimana, Thadée Kantungeko, Bernard Bigirimana, Berchmans Manirakiza, Sylvestre Nzambimana, Elias Hakizimana, Jean-Marie Nshimirimana, Astère Nahimana, Audace Nizigiyimana and Bernard Ndayisenga. The Government has not replied to the communication. The State has been a party to the International Covenant on Civil and Political Rights since 9 May 1990.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (a. when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. This case concerns the following 19 persons:

(a) Major Vital Ndikumwenayo, born in 1974 in Bururi and detained in Rumonge prison;

(b) Captain Innocent Manirambona, born in 1978 in Minaro and detained in Muramvya prison;

(c) Second Lieutenant Alphonse Akimana, born in 1988 in Bujumbura and detained in Rumonge prison;

(d) Major Warrant Officer Firmin Niyonkuru, born in 1968 in Bururi and detained in Muramvya prison;

(e) Warrant Officer Dismas Nduwayezu, born in 1975 in Bururi and detained in Gitega prison;

(f) Warrant Officer Claude Nkeshimana, born in 1975 in Mwaro and detained in Gitega prison;

(g) Warrant Officer Télesphore Mbazumutima, born in 1976 in Mwaro and detained in Gitega prison;

(h) First Sergeant Major Denis Bigirimana, born in 1978 in Kayanza and detained in Rumonge prison;

(i) Corporal Jean-Pierre Kantungeko, born in 1973 in Bururi and detained in Gitega prison;

(j) Corporal Dismas Birigimana, born in 1979 in Bururi and detained in Muramvya prison;

(k) Corposal Thadée Kantungeko, born in 1976 in Bururi and detained in Gitega prison;

(l) Corporal Bernard Bigirimana, born in 1977 in Bururi and detained in Gitega prison;

(m) Corporal Berchmans Manirakiza, born in 1973 in Gitega and detained in Gitega prison;

(n) Corporal Sylvestre Nzambimana, born in 1972 in Mwaro and detained in Rumonge prison;

(o) Corporal Elias Hakizimana, born in 1975 in Muramvya and detained in Muramvya prison;

(p) Corporal Jean-Marie Nshimirimana, born in 1976 in Gitega and detained in Muramvya prison;

(q) Corporal Astère Nahimana, born in 1978 in Kayanza and detained in Muramvya prison;

(r) Corporal Audace Nizigiyimana, born in 1979 in Mwaro and detained in Muramvya prison; and

(s) Lance Corporal Bernard Ndayisenga, born in 1981 in Kayanza and detained in Gitega prison.

Background

5. The source reports that the Arusha Peace and Reconciliation Agreement of 28 August 2000, which sought to terminate the civil war that had been raging since 1993, provided for governance principles conducive to power-sharing between the different components of the population of Burundi. One reform consisted in reconstituting the army so that it was composed of an equal proportion of Hutus and Tutsis. Accordingly, a new national defence force composed of the rebels and the former army, in line with the principle of ethnic representation, was established in 2003.

6. According to the source, since 2010 Burundi has once again been the scene of persistent violence, especially since the re-election of President Pierre Nkurunziza, on account of the strong opposition and the crimes committed against it. There has been an increase in attacks on Government forces and violent crackdowns on the opposition involving arrests, mass detention as well as ill-treatment and killings. In addition, the source reports that lawyers, human rights defenders and journalists have been the target of such abuse since July 2011.

7. The policy of repression intensified after the announcement of the President's third term and the failed coup of 13 May 2015. The source reports that a citizens' protest movement was launched in April 2015 to demand compliance with the Arusha Agreement. The movement was violently repressed by the police and by the Imbonerakure militia, which was set up by the former rebels, who hold power today. According to the source, these two repressive forces, the police and the militia, specifically targeted civil society and human rights defenders. Most human rights defenders have been living in hiding since then or have gone into exile. The source also reports that leaders of opposition political parties have allegedly been murdered or are missing.

8. Lastly, the source reports that the repression has been accompanied by purges targeting primarily members of the former armed force of Tutsi ethnicity. Since the launching of the peaceful demonstrations in April 2015, the former rebels, who are currently in power, target soldiers from the former army, who are victims of murder, abduction, disappearance or arbitrary detention.

9. The source also reports that there is a general problem of judicial corruption, which creates a sense of legal insecurity among citizens. The problem is linked to the failure to allocate adequate resources to judges and results in diminished commitment on the part of the judiciary, a lack of independence and, in addition, interference by the executive. The source also reports a lack of legal assistance and of compensatory procedural safeguards, as well as cases of harassment and threats against lawyers. All these recurring phenomena in Burundi entail, according to the source, fundamental violations of the right to a fair trial and other rights of the defence.

Arrest and detention

10. The source reports that the crisis relating to the President's third term produced palpable tensions. Sporadic gunfire was heard almost throughout the night of 11 to 12 December 2015. The source also reports the self-proclamation of two rebel movements. Unidentified armed groups attacked various military camps in Bujumbura almost simultaneously during the night and were repelled. Weapons were allegedly stolen from two military camps.

11. Following these attacks, the defence and security forces and the Imbonerakure militia, according to the source, perpetrated targeted killings of civilians from disputed neighbourhoods. As a result, 87 people, described by the army spokesman as "rebels", were allegedly killed.

12. Moreover, on 12 December 2015, the National Intelligence Service allegedly selected 19 soldiers from the former army, all ethnic Tutsis, from the 85 soldiers tasked with guarding the attacked camps, and imprisoned them on the pretext that they were in

collusion with the rebels. The situation of the persons concerned, who have been detained ever since, is addressed in this case.

13. The source believes that their arrest was based on discriminatory grounds involving harassment of soldiers belonging to the Tutsi ethnic group. The source alleges that an army general who supervised their arrest expressed ethnic hatred of soldiers of Tutsi ethnicity.

14. The source claims that the 19 soldiers were detained and interrogated in military police cells by the intelligence service of the Army General Staff from the day of their arrest until 22 December 2015. The source also alleges that the minutes were prepared by officers of the army intelligence service who were incompetent, since the service lacks the authority of the Military Prosecutor's Office.

15. A public prosecutor from the Bujumbura Court of Appeal reportedly had them sent to Muramvya Prison. The source alleges that the prosecutor in question also lacked the requisite authority because the Military Prosecutor's Office is the sole authority with competence to investigate offences potentially committed by soldiers, or alternatively the Attorney General, in consultation with the Chief Military Prosecutor, in accordance with article 127 of the Code of Judicial Organization and Jurisdiction of Burundi. The source alleges that no written decision to apply article 127 was adopted. Even if the Attorney General had entrusted the file to the chief public prosecutor at the Court of Appeal, jurisdiction to rule on the case remained, according to the source, with the Military Court of Bujumbura.

16. In the source's opinion, these cases were not referred to military courts with jurisdiction to rule upon them. The Court of Appeal in question is only authorized to try military personnel in cases involving complicity with civilians, but no civilian is mentioned in the case file in question.

17. In addition, the source notes that article 14 of the Legislative Decree of 27 August 1980 concerning the Code of Organization and Jurisdiction of Military Courts stipulates that: "In a case involving interlinked offences committed by several military officers of different ranks, the competent court shall be that with jurisdiction to try the highest ranking officer." Article 11 of the Decree stipulates that: "The Military Court shall only try offences under article 9 committed by army officers of a rank equal to or greater than that of a major and by officials assimilated to them pursuant to a decree." The source therefore considers that the 19 defendants should be tried by the Military Court, which is authorized to try the highest ranking officer, in this case the Major.

18. The source alleges that, in addition to the unlawful 11-day period of police custody ordered by the authorities conducting the investigation, the 19 individuals were sent to Muramvya prison without having appeared before the detention judge and were therefore never charged, notwithstanding the provisions of the Code of Criminal Procedure, according to which "[n]o ruling may be issued on a case until the lawfulness of the detention has been exhaustively reviewed" (art. 112) and "[t]he investigating judge ... shall decide on a person's release or the issuance of an arrest warrant. The person concerned shall appear before the judge no later than 15 days after the issuance of the arrest warrant" (art. 111).

19. The source reports that the said persons were accused of breaching internal security and of complicity with the persons who carried out the attacks.

20. According to the source, the Court of Appeal of Bujumbura, despite the alleged shortcomings, held a public hearing on 8 January 2016, invoking the pretext of flagrante delicto, following which it conducted deliberations on the case.

21. The source reports that the Court of Appeal of Bujumbura, invoking the right to flagrante delicto proceedings, launched expedited deliberations on the case without enabling the defendants to exercise their right to legal aid and to present a defence. An unfair judgment was handed down on 12 March 2016, and the lawyers and defendants were not provided with a copy thereof. The source alleges that the flagrante delicto proceedings were designed to prevent the defence from accessing the file, which constituted a violation of the rights of the defence.

22. With regard to the flagrante delicto proceedings invoked as a pretext for holding a hearing, the source argues that the charges levelled against the 19 persons did not fall into the category of flagrante delicto. The source points out that the legal conditions laid down in article 21 of the Code of Criminal Procedure for flagrant offences were not met: their arrest was not related to a hue and cry or a flagrant offence, and the said persons were not found to be in possession of objects suggesting that they had participated in the crime.

23. The source further alleges that, according to the Public Prosecutor's Office, police custody in the event of a flagrant offence may not, according to article 21 of the Code of Criminal Procedure, exceed 36 hours. Police custody in the case in question continued for 11 days, thereby exceeding the prescribed time limit.

24. With regard to the violations of the right of defence, the source alleges that the 19 persons were denied access to assistance from lawyers both during the preliminary stage and during the first-instance judicial proceedings. On the day of the hearing, some lawyers reportedly turned up and unsuccessfully requested access to the file. The lawyers nonetheless raised an objection to the jurisdiction of the Court of Appeal to deal with an exclusively military case. However, the Court failed to rule on the objection to jurisdiction, thereby breaching article 161 of the Code of Criminal Procedure, ruled on the merits without prior deliberations and convicted the defendants. Four persons were sentenced to life imprisonment and the remaining 15 were sentenced to a 20-year term of imprisonment. According to the source, the Court thus invoked the pretext of flagrante delicto proceedings, but violated the right of defence inasmuch as the accused persons were denied the assistance of a lawyer and were unable to present a defence.

25. The source reports that the case has, since then, been heard on appeal and before the Supreme Court. The 19 detainees are continuously moved from one prison to another and allegedly face a permanent risk of execution.

26. In light of the foregoing, the source argues that the detention of the 19 persons falls under categories I and III.

Response from the Government

27. A communication concerning these allegations was sent to the Government of Burundi on 21 December 2017. The Working Group, in accordance with its methods of work, set 20 February 2018 as the time limit for its response. The Working Group regrets that it did not receive a response from the Government to the communication nor a request for an extension of the time limit.

Discussion

28. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

29. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the source has submitted allegations which are free from inherent contradiction and substantiated by items of evidence provided by the source. Moreover, the current situation in Burundi as well as the recurrent allegations of related violations, such as arrests, arbitrary detention, biased judges and failure to respect the rights of the defence, have been extensively documented, as evidenced by previous Group opinions.[1] This enhances the credibility of the source. Accordingly, the lack of a response from the Government implies that it has deliberately chosen, contrary to its interests, to refrain from challenging the prima facie credible allegations.

[1] See opinions No. 30/2015; No. 8/2016; No. 54/2017; No. 57/2012; No. 17/2012; and No. 33/2014.

30. The Working Group recalls that it has repeatedly expressed concern regarding such allegations in its jurisprudence.[2] The Working Group also takes note in this connection of Human Rights Council resolutions S-24/1 of 17 December 2015 and 33/24 of 30 September 2016, and the report of the United Nations Independent Investigation on Burundi established pursuant to Human Rights Council resolution S-24/1 (A/HRC/33/37), which states that "arbitrary arrests and detention have been a cornerstone of the repression in Burundi and have opened the way for a wide range of other human rights violations" (para. 65) and that the investigations "confirmed abuse of pretrial detention" (para. 70). In the present case, the Government has chosen not to rebut the credible allegations submitted by the source, which the Working Group therefore considers to have been substantiated.

31. The source reports that the 19 persons concerned, after spending 11 days in custody, were sent to Muramvya prison without appearing before a judge. The relevant international norm requires all arrested and detained persons to be brought promptly before a judge. The Working Group reflected this norm in principle 8, read in conjunction with principles 4 and 6 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court (A/HRC/30/37). The Human Rights Committee, commenting on the same norm, stated that a reasonable period for bringing an arrested person before a judge should be interpreted as a period not exceeding 48 hours.[3] The Working Group also notes that, according to the source, this is the period prescribed by article 113 of the Code of Criminal Procedure of Burundi, which is therefore in conformity with article 9 of the Covenant. Furthermore, the Working Group has consistently held that pretrial detention must be an exceptional measure and as such should be justified in each individual case.[4] The Working Group concludes that, given the violation of this international norm in the present case, the detention of the persons concerned is devoid of any legal basis. Their detention is therefore arbitrary under category I. At the same time, the Working Group notes that the argument concerning flagrante delicto cannot prevail in the absence of adequate temporal elements.

32. The source also states that the 19 individuals were denied the effective assistance required to prepare their defence and that they were unable to access the content of their file or their judgments. Given these allegations, the Working Group draws attention to general comment No. 35 (2014) of the Human Rights Committee, according to which States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.[5] It also notes that, according to the Committee's general comment No. 32 (2007), the right to communicate with counsel requires that the accused be granted prompt access to counsel.[6] The Committee states in the same comment that the right to equality before courts and tribunals guarantees the principles of equal access and equality of arms, and ensures that the parties to the proceedings are treated without any discrimination.[7]

33. The Working Group therefore considers that the facts reported by the source reveal numerous violations of the right to a fair trial, including violation of the right to liberty while awaiting trial, violation of the right to legal representation, and violation of the parties' right to equality of arms during the proceedings. The continuous detention in this case thus violates articles 9 and 14 of the Covenant; article 7 of the African Charter on Human and Peoples' Rights; article 10 of the Universal Declaration of Human Rights; rules 43, 44, 45 and 119 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules); and principles 4, 11, 18, 32 (1), 37, 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group considers that these violations are of such gravity as to give the deprivation of liberty an arbitrary character under category III.

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[2] Ibid.

[3] See the Committee's general comment No. 35 (2014) on liberty and security of persons, para. 33.

[4] See opinion No. 62/2017 (A/HRC/WGAD/2017/62). See also general comment No. 35, para. 38.

[5] See general comment No. 35 (2014), para. 35.

[6] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 34.

[7] Ibid., para. 8.

34. The source mentioned discrimination in the response to the crisis, and indicated that the 19 persons concerned are all Tutsis and hence belong to the group targeted by the discrimination. Although it presented no arguments concerning category V, the Working Group is free to consider all categories of arbitrary detention that are relevant when it comes to characterizing the facts of the case. Furthermore, the Working Group considers that the arrest and detention of the persons concerned are clearly the outcome of ethnic discrimination and are therefore arbitrary under category V.

Disposition

35. In light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Vital Ndikumwenayo, Innocent Manirambona, Alphonse Akimana, Firmin Niyonkuru, Dismas Nduwayezu, Claude Nkeshimana, Télesphore Mbazumutima, Denis Bigirimana, Jean-Pierre Kantungeko, Dismas Birigimana, Thadée Kantungeko, Bernard Bigirimana, Berchmans Manirakiza, Sylvestre Nzambimana, Elias Hakizimana, Jean-Marie Nshimirimana, Astère Nahimana, Audace Nizigiyimana and Bernard Ndayisenga, being in contravention of article 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls under categories I, III and V.

36. The Working Group requests the Government of Burundi to take the necessary steps to remedy the situation of the 19 persons without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

37. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release the 19 persons immediately, to accord them an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide them with appropriate medical care.

38. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of the 19 persons and to take appropriate measures against those responsible for the violation of their rights.

Follow-up procedure

39. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether the 19 persons have been released and, if so, on what date;

(b) Whether reparations, including compensation and a guarantee of non-repetition, have been made to the 19 persons;

(c) Whether an investigation has been conducted into the violation of the 19 persons' rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Burundi with its international obligations, in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

40. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

41. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the

opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

42. The Government should disseminate through all available means the present opinion among all stakeholders.

43. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[8]

[*Adopted on 18 April 2018*]

[8] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 8/2018 concerning Mr. N (whose name is known by the Working Group) (Japan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 21 December 2017, the Working Group transmitted to the Government of Japan a communication concerning Mr. N. The Government submitted a late response to the communication on 6 April 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. N is a citizen of Japan residing in Tokyo. The source reports that Mr. N had previously been treated for schizophrenia for 15 years.

5. According to the source, on 19 July 2017, Mr. N went to buy cigarettes at a barbecue house situated near his residence. After being told that he could not buy tobacco, Mr. N tried to steal a soft drink. The staff of the barbecue house noticed his actions and called the police.

6. The source states that Mr. N was then arrested by officers from a police station of the Metropolitan Police Department. The officers did not show a warrant or any other decision issued by a public authority. Mr. N was then taken to a police station.

7. It is reported that the authorities transferred Mr. N by helicopter from the police station to Tokyo Metropolitan Matsuzawa Hospital. On the following day, Mr. N was subjected to involuntary committal at this hospital. He has no recollection of whether a doctor diagnosed him and received no explanation concerning his involuntary committal.

8. According to the source, Mr. N's detention was ordered by the Governor of Tokyo under article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950).

9. The source states that, following Mr. N's transfer to Matsuzawa Hospital, his form of hospitalization was changed from "involuntary admission based on dangerousness" to "involuntary admission based on incompetency". The source recalls that "involuntary admission based on incompetency" is one of the forms of compulsory hospitalization that require the consent of a designated physician and of the family of the individual concerned.

10. The source further submits that article 38 (4) of the Act on Mental Health and Welfare for the Mentally Disabled stipulates that a person hospitalized in a psychiatric hospital, or his or her family members, can request the Governor of the Prefecture to grant him or her permission to leave the hospital. On 24 August 2017, Mr. N requested to be discharged from the hospital. That request was reportedly denied.

11. The source adds that, according to the results of a survey conducted by the Ministry of Health, Labour and Welfare in 2016, only 4.3 per cent of requests for discharge were granted on the basis of "inappropriate hospitalization or treatment". In addition, the authorities view the step of taking into account the opinion of the individual concerned as being optional and decisions to hospitalize an individual cannot be appealed against.

12. According to the source, on 30 October 2017, Mr. N was transferred from Matsuzawa Hospital to Koganei Hospital in Tokyo, where he remains to date. Reportedly, the current form of hospitalization in his regard is "voluntary committal". However, Mr. N is unable to freely leave the hospital and there is no concrete plan to discharge him. It is thus alleged that Mr. N continues to be subjected to indefinite detention.

13. The source submits that the deprivation of liberty of Mr. N lacks legal basis and is discriminatory, given that he has a psychiatric disorder. The source therefore argues that his detention is arbitrary according to categories I and V.

14. In relation to category I, the source argues that the requirements for compulsory hospitalization are not satisfied in the present case and that, therefore, the hospitalization of Mr. N has no legal basis and is illegal. The source specifies that, according to article 29 (1) of the Act on Mental Health and Welfare for the Mentally Disabled, persons with psychiatric disorders will be forcibly admitted to a hospital if there is a danger of them harming themselves or others due to their psychiatric disorders unless they are hospitalized for medical care and protection.

15. The source argues that the criminal act committed by Mr. N was an attempted theft caused by self-interest and not by his psychiatric disorder. Mr. N did not commit the act of attempted theft while suffering from delusions of persecution or auditory hallucinations. Therefore, the source submits that there is no causal relationship between Mr. N's

psychiatric disorder and his criminal act. The source thus asserts that the deprivation of his liberty does not fulfil the requirement of article 29 (1) of the Act on Mental Health and Welfare for the Mentally Disabled.

16. The source submits that, under national criminal procedure, in the case of an attempted theft, the arrest and detention of a suspect (except when arresting an offender in flagrante delicto without an arrest warrant) are permitted only when based on a warrant issued by a judge under certain conditions at a certain stage of the criminal investigation. Furthermore, when suspects are detained, it is mandatory for judges to hear them directly. Should a suspect request that the grounds for his or her detention be disclosed, the court must do so in a public hearing. In the case of attempted theft, suspects have the right to be provided with legal counsel from the beginning of their detention. Those procedural guarantees of due process are stipulated in articles 31 and 33–34 of the Constitution of Japan. However, the case of Mr. N was reportedly handled in line with the procedure outlined in the Act on Mental Health and Welfare for the Mentally Disabled.

17. The source notes that Mr. N has been detained through compulsory hospitalization without a judicial procedure. From the standpoint of criminal proceedings, the detention of Mr. N lacks a legal basis, as the authorities did not follow the proper procedure.

18. In relation to category V, the source argues that Mr. N was deprived of his right to a criminal trial with due process guarantees. The source reiterates that Mr. N committed the crime not because of his psychiatric disorder but because of self-interest and that, therefore, his case should have been dealt with through criminal proceedings. The source thus submits that depriving Mr. N of criminal proceedings constitutes discrimination based on his disability.

19. The source submits that the authorities have violated articles 5, 12 and 14 of the Convention on the Rights of Persons with Disabilities, which Japan ratified on 20 January 2014 and which contains clauses prohibiting discrimination. The source also submits that the authorities have violated article 26 of the International Covenant on Civil and Political Rights.

20. The source further submits that Mr. N was deprived of his right to a fair trial, provided for under article 14 (1) of the Covenant. He was also deprived of a judicial procedure, contrary to article 13 of the Convention on the Rights of Persons with Disabilities.

21. Moreover, the source argues that Mr. N had no previous criminal record and that the attempted theft in the present case would have led to insignificant damage to property that he himself could have compensated. Therefore, there was a high possibility that the Public Prosecutor would have entered a nolle prosequi. Were Mr. N to have been prosecuted, it is high likely that his sentence would have been suspended or relatively short in length. The source thus argues that, if Mr. N had faced criminal proceedings, he would not currently be deprived of his liberty.

22. According to the source, guidelines for staff involved in the revision and enforcement of the Act on Mental Health and Welfare for the Mentally Disabled stipulate that careful consideration must be given to the substantive nature, and the extent of, the infringement when judging the need for hospitalization. Also, the force exercised on patients should be kept to the necessary minimum. The source submits that, in the case of Mr. N, there was no careful consideration of the need for compulsory hospitalization. His crime was a crime against property and would not have harmed anyone. The degree of material damage caused by his act was also very small. The source asserts that confining Mr. N in a protection room went beyond the necessary minimum level of force and ignored the principle of proportionality.

23. According to the source, in Japan, inpatient wards are generally not locked and only psychiatry wards may be locked under article 16 (1) (vi) of the Ordinance for Enforcement of the Medical Care Act (Ministry of Health, Labour and Welfare Ordinance No. 50). More than 53 per cent of voluntarily hospitalized patients are placed in locked psychiatry wards. Approximately 94 per cent of all patients are hospitalized in locked wards, including patients who are in a locked ward only at night.

24. The source notes that Mr. N was hospitalized in a locked ward and was unable to freely leave. It is argued that there was a lack of adequate consideration given to the substance of the criminal act committed by Mr. N, a person with a psychiatric disorder. The source argues that Mr. N was only detained because he has a psychiatric disorder.

Response from the Government

25. On 21 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 20 February 2018, detailed information about Mr. N's current situation and any comments on the source's allegations.

26. On 6 March 2018, the Working Group received a request for extension of the time limit from the Government. The Working Group notes that, in accordance with paragraphs 15 and 16 of its methods of work, any such requests must be submitted within the original deadline set by the Working Group. In the present case, the request was submitted some two weeks after the expiration of the original deadline of 20 February 2018 and was therefore denied.

27. The Government of Japan nevertheless submitted a reply on 6 April 2018. That reply was some six weeks late and therefore the Working Group cannot accept it as if it had been presented within the time limit.

Discussion

28. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

29. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

30. The Working Group would like to stress that the procedural rules for handling communications from sources and responses of Governments are contained in its methods of work and in no other international instrument that the parties might consider applicable. In that regard, the Working Group would like to clarify that, in its methods of work, there is no rule applicable that impedes the consideration of communications due to the lack of exhaustion of domestic remedies in the country concerned. Therefore, sources have no obligation to exhaust domestic remedies before sending a communication to the Working Group.[1]

31. The Working Group notes that Mr. N was initially detained by the police on 19 July 2017 following the attempted theft of a soft drink from a barbecue house. During that incident there were no reported altercations between Mr. N and the barbecue house personnel or between Mr. N and the police. There are no allegations that Mr. N suffered from any medical episode at the time of the attempted theft, or that he was violent. The Working Group also notes that the Government of Japan has chosen not to rebut those submissions, even though it had the opportunity to do so.

32. The Working Group therefore concludes that the only reason for the initial arrest of Mr. N could have been the theft of the can of drink, which cannot be regarded as a serious criminal offence. Nevertheless, since Mr. N was caught in the act of stealing, the Working Group accepts that the police may have been right to arrest him and that the arrest could have taken place without a warrant on the grounds that he was caught in flagrante delicto.

33. However, following his initial arrest, Mr. N was transferred by police to Tokyo Metropolitan Matsuzawa Hospital and subjected to involuntary committal at this hospital.

[1] See, for example, opinions No. 38/2017; No. 19/2013 and No. 11/2000.

This involuntary hospitalization allegedly took place on the basis of article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950). The Working Group notes that the Government has chosen not to challenge those submissions, even though it had the opportunity to do so.

34. The Working Group observes that arbitrary detention can occur not only in criminal justice settings but also in health-care settings, such as psychiatric hospitals and other institutions where individuals may be deprived of their liberty. As the Working Group has stated in its most recent annual report, the deprivation of personal liberty occurs when a person is being held without his or her free consent.[2] In the present case, Mr. N has been unable to leave the hospital, even though he wishes to do so; therefore his involuntary hospitalization constitutes deprivation of liberty in the view of the Working Group.

35. The Working Group notes that article 9 of the Covenant requires that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by national law. In the present case, the Working Group observes that article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950) permits hospitalization only when two or more designated mental health doctors have made the same judgment that the person in question has a psychiatric disorder and that he or she could harm himself or herself or others due to his or her psychiatric disorder unless he or she is hospitalized for medical care and protection. In such a case, the Governor of the Prefecture shall inform the person in question, in writing, of the fact that he or she is to be involuntarily admitted.

36. Without making any assessment of the compatibility of the above-mentioned provisions of the Act on Mental Health and Welfare for the Mentally Disabled with the international human rights obligations of Japan, it appears obvious to the Working Group that those provisions were not followed during the involuntary hospitalization of Mr. N. First, the initial detention of Mr. N was carried out by the police following a reported theft, and not on the basis of a decision made by a designated doctor who had previously assessed Mr. N's health. Second, upon Mr. N's transfer to the hospital, he was not examined by at least two designated doctors with a view to ascertaining whether his hospitalization was necessary, as clearly required under national legislation. Third, Mr. N was not notified, in writing, of the need for involuntary admission. Consequently, his involuntary admission to Tokyo Metropolitan Matsuzawa Hospital disregarded all the prescriptions of article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950). The Working Group notes that the Government of Japan has chosen not to challenge any of those submissions.

37. The Working Group recalls that is not sufficient that a law exists that may justify the detention of a person; the authorities must invoke that law in the individual circumstances and do so in compliance with the procedure prescribed by that law.[3] In the present case, while article 29 of the Act on Mental Health and Welfare for the Mentally Disabled may have justified the deprivation of liberty of Mr. N, the failure of the Japanese authorities to follow the procedure prescribed in that law means that they cannot point to the provisions of the Act as the legal basis justifying the deprivation of liberty. In other words, the Working Group concludes that the authorities of Japan failed to respect national legal provisions in relation to the involuntary hospitalization of Mr. N and thus also breached article 9 of the Covenant, which specifically requires that any detention be carried out in accordance with the law.[4]

38. The Working Group wishes to underline that any instance of deprivation of liberty, including internment in psychiatric hospitals, must meet the standards set out in article 9 of the Covenant. The Working Group, in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court, states that, where a person with a disability is deprived of his or her liberty through any process, that person is, on an equal basis with others, entitled to

[2] See A/HRC/36/37, para. 51; A/HRC/30/37, para. 9; and opinion No. 68/2017.
[3] See, for example, opinions No. 75/2017, No. 66/2017 and No. 46/2017.
[4] See opinion No. 68/2017.

guarantees in accordance with international human rights law, necessarily including the right to liberty and security of person, reasonable accommodation and humane treatment in accordance with the objectives and principles of the highest standards of international law pertaining to the rights of persons with disabilities. A mechanism complete with due process of law guarantees shall be established to review cases of placement in any situation of deprivation of liberty without specific, free and informed consent. Such reviews are to include the possibility of appeal.[5]

39. The Working Group observes that all such due process guarantees were absent in relation to the involuntary hospitalization of Mr. N, in a further breach of article 9 of the Covenant.

40. The Working Group recalls that, according to the Basic Principles and Guidelines, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[6] That right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty, as well as to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[7] Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[8]

41. The Working Group notes that those provisions were plainly ignored in the case of Mr. N, as he was unable to challenge the legality of his involuntary admission to Tokyo Metropolitan Matsuzawa Hospital.

42. Moreover, the Working Group notes that, on 30 October 2017, Mr. N was transferred to Koganei Hospital and his status was changed to that of "voluntary hospitalization". The Working Group observes that Mr. N denies having consented to such hospitalization, and that the Government has failed to produce any evidence to the contrary, although it had the possibility to do so. The Working Group must, therefore, conclude that the hospitalization of Mr. N in Koganei Hospital was not voluntary and that he has therefore been in continuous involuntary hospitalization since 19 July 2017. The Working Group notes that, throughout those nine months, the involuntary hospitalization of Mr. N was not subject to any reviews by an independent authority that would ascertain the need for and appropriateness of involuntary hospitalization and the proportionality of that measure given the individual circumstances of the case. That situation is a further clear breach of article 9 (4) of the Covenant.

43. The Working Group concludes that the involuntary hospitalization of Mr. N on 19 July 2017 and his continued internment in hospital are arbitrary and fall under category I, as they were not carried out in accordance with the procedure established by national law and therefore lacked the requisite legal basis, and did not provide for the requisite due process guarantees, given that Mr. N was not able to challenge the legality of his detention.[9]

44. The source has also submitted that the detention of Mr. N falls under category V, since his involuntary hospitalization was discriminatory, being carried out on the basis of his psychiatric disorder. The Working Group notes the absence of a timely reply from the Government in relation to that allegation.

45. The Working Group also notes that Japan has been a party to the Convention on the Rights of Persons with Disabilities since 20 January 2014. The Working Group reiterates

[5] See A/HRC/30/37, paras. 104–105.
[6] Ibid., paras. 2–3.
[7] Ibid., para. 47 (a).
[8] Ibid., para. 47 (b).
[9] See also opinion No. 68/2017.

that it is contrary to the provisions of article 14 of the Convention to deprive a person of his or her liberty on the basis of disability.[10] Moreover, as stated in the Basic Principles and Guidelines, the involuntary committal or internment of persons on the grounds of the existence of an impairment or perceived impairment is prohibited.[11]

46. The Working Group once again wishes to emphasize that Mr. N was initially detained for the minor offence of attempted theft of a can of carbonated drink. Neither at the time of his detention nor prior to that there is any evidence of Mr. N being violent or otherwise presenting a danger to himself and/or to others. His subsequent transfer to Tokyo Metropolitan Matsuzawa Hospital had no connection to the initial incident of attempted theft. It is therefore clear to the Working Group that the deprivation of liberty of Mr. N was carried out purely on the basis of his psychiatric disorder, and was thus discriminatory. The Working Group therefore concludes that Mr. N's detention and his subsequent internment in Tokyo Metropolitan Matsuzawa Hospital and Koganei Hospital were discriminatory and fall under category V.

47. The Working Group refers the present case for further consideration to the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

48. The Working Group would welcome the opportunity to work constructively with the Government of Japan to address its serious concerns relating to arbitrary deprivation of liberty. On 30 November 2016, the Working Group sent a request to the Government to undertake a country visit and welcomes the engagement of the Government through the meetings the Working Group has held with the Permanent Mission of Japan to the United Nations Office and other international organizations in Geneva to discuss further the possibility of such a visit. On 2 February 2018, the Working Group sent a further request to the Government to undertake a country visit and hopes that it will receive a positive response from the Government as a sign of its willingness to enhance its cooperation with the special procedures of the Human Rights Council.

Disposition

49. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mr. N, being in contravention of articles 2, 3, 6, 7, 8 and 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and V.

50. The Working Group requests the Government of Japan to take the steps necessary to remedy the situation of Mr. N without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

51. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. N immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

52. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. N and to take appropriate measures against those responsible for the violation of his rights.

53. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on disability and the Special Rapporteur on health.

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[10] See A/HRC/36/37, para. 55; opinion No. 68/2017; and Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 19.

[11] See A/HRC/30/37, para. 103.

Follow-up procedure

54. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. N has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. N;

(c) Whether an investigation has been conducted into the violation of Mr. N's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Japan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

55. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

56. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

57. The Government should disseminate through all available means the present opinion among all stakeholders.

58. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken. [12]

[*Adopted on 19 April 2018*]

[12] See Human Rights Council resolution 33/30, paras. 3 and 7.